

DRAFT 2.11.13

HOUSE OF REPRESENTATIVES/DELAWARE STATE SENATE

146TH GENERAL ASSEMBLY

HOUSE/SENATE BILL NO.

AN ACT TO AMEND CHAPTER 74 OF TITLE 7, OF THE DELAWARE CODE RELATING TO UNDERGROUND STORAGE TANKS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF DELAWARE:

Section 1. Amend §7402, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(5) "Facility" means any location or part thereof that contains or had previously contained ~~containing~~ 1 or more underground storage tanks.

Section 2. Amend § 7402, Title 7 of the Delaware Code by adding thereto a new subsection to read as follows:

(23) "Change in Ownership Assessment" means to measure for the presence of a release where contamination of regulated substances is most likely to be present on, under, or about a facility. Selection of sample types, sample locations and measurement methods shall be based on the nature of the stored regulated substance, the type of backfill, the depth to groundwater, and other factors appropriate for identifying the presence and scope of a release.

Section 3. Amend § 7402, Title 7 of the Delaware Code by adding thereto a new subsection to read as follows:

(24) "Corrective Action" means the sequence of actions, or process, that includes confirming a release, site assessment, interim remedial action, remedial action, monitoring, and termination of remedial action.

Section 4. Amend §7406, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(a) No person shall knowingly allow a release from an underground storage tank to continue without taking immediate steps to report the release to the Department.

(b) Responsible parties shall take measures for the prompt control, containment, and removal of the released regulated substances to the satisfaction of the Department.

(c) The Department may assume control of any release situation when it is determined that responsible parties are not responding promptly. However, all liability will remain with the

responsible party. Control of any release situation includes without limitation the entry by the Department upon the facility and any other real property public or private, on or under which the released regulated substances are present, to install water treatment on contaminated drinking water systems, vent indoor air contaminants, remove and remediate regulated substances and substrate from the subsurface, remove or close in place leaking underground storage tanks, investigate the extent of the release through environmental sampling, and undertake any other such corrective action to control, contain, and remove the released regulated substances. The Department shall not be deemed a responsible party based on any actions it may take in assuming control of a release situation.

(d) The Department may file an action in Superior Court against any responsible party for cost recovery and reimbursement of funds expended in control and remediation of any underground storage tank release situations, and activities associated with underground storage tank removals and closures in place. Any cost recovery and reimbursement collected by the Department shall be credited to and expended by the Department for control of other underground storage tank releases and to support the purposes of this Chapter. The liability of responsible parties is joint and several. Any responsible party may seek contribution from any other responsible party. In resolving contribution claims, the Superior Court may allocate costs among responsible parties using such principles of fairness and justice as the Superior Court deems appropriate.

(e) Where there are regulated substances on or under a facility, which are not contained by an underground storage tank, it shall be presumed as a rebuttable presumption of law in civil and administrative proceedings that such regulated substances were released at and by the facility from one or more underground storage tanks at the facility. The responsible party may overcome this presumption by affirmatively proving, through clear and convincing evidence based on recognized and generally accepted good engineering, hydrogeologic, and other practices and techniques, established within the underground storage tank field, that all regulated substances on or under the facility, not contained by an underground storage tank, were released by or originated from some identified physical source other than the facility and/or underground storage tanks associated with the responsible party.

(f) Where there are regulated substances on or under a facility which are not contained by an underground storage tank, it shall be presumed as a rebuttable presumption of law in civil and administrative proceedings that the responsible party associated with the facility and/or one or more underground storage tanks proximately caused the release of the regulated substances from the facility and/or one or more underground storage tanks. The responsible party may overcome this presumption by affirmatively proving, through clear and convincing evidence based on recognized and generally accepted good engineering, hydrogeologic, and other practices and techniques, established within the underground storage tank field, that the responsible party did not contribute to the release and to the risk of the release, and did not allow the release to continue by taking all reasonable and required actions to limit the scope and damaging impact of the release.

(g) The foregoing remedial enactments in this Section are effective and apply retroactively to releases of regulated substances, acts or omissions occurring on or after July 12, 1985.

Section 5. Amend § 7408, Title 7 of the Delaware Code by adding thereto a new subsection to read as follows:

(d) The Department may enter, at reasonable times, upon any real property, public or private, to conduct sampling, inspection, examination, and investigation, evaluate a release, suspected release, and imminent threat of a release from an underground storage tank, and determine the need for corrective action, upon giving to the owner, operator, or property owner, if available, verbal notice and presentation of official identification.

Section 6. Amend §7410, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

7410. Financial responsibility.

(a) The Department shall adopt regulations for maintaining evidence of financial responsibility by all owners and operators for taking corrective action by all owners and operators, in an amount of not less than \$100,000 per occurrence, and for compensating third parties for bodily injury and property damages by all owners and operators in an amount of not less than \$300,000 per occurrence in cases of releases arising from operating an underground storage tank. Financial responsibility may be established in accordance with regulations promulgated by the Department by any 1 or any combination of the following: Insurance, guarantee, surety bond, letter of credit or qualification as a self insurer in accordance with regulations promulgated by the Insurance Commissioner caused by accidental releases from the operation of underground storage tank systems in the following amounts:

(1) an amount of not less than \$1,000,000 per occurrence for taking corrective action and \$1,000,000 per occurrence for compensating third parties for bodily injury and property damage for underground storage tank systems located at Petroleum Marketing Facilities or that handle an average of more than 10,000 gallons of regulated substance per month based on an annual throughput for the previous calendar year or that store hazardous substances, or in an amount not less than \$500,000 per occurrence for all other underground storage tank systems; and

(2) an amount of not less than \$1,000,000 annual aggregate for taking corrective action and \$1,000,000 annual aggregate for compensating third parties for bodily injury and property damage for owners and operators of 1 to 100 underground storage tank systems or an amount of not less than \$2,000,000 annual aggregate for taking corrective action and \$2,000,000 annual aggregate for compensating third parties for bodily injury and property damage for owners and operators of more than 100 underground storage tank systems.

(b) Financial responsibility may be established in accordance with regulations promulgated by the Department and may include the following: insurance, guarantee, surety bond, irrevocable

letter of credit, trust fund, or qualification as a self-insurer. In addition, local governments may establish evidence of financial responsibility by any of the following: local government bond rating test, local government financial test, local government guarantee, or local government fund. The Owner and Operator shall provide written notification to the Department within thirty days of any substantive change in the financial responsibility mechanism, including but not limited to cancellation, non-renewal, substitution of alternate financial responsibility mechanism, or change in financial responsibility provider. Such written notification shall include but not be limited to the names and addresses of the providers involved, the financial responsibility mechanisms involved, and the effective date of change.

(bc) Any claim arising out of conduct for which evidence of financial responsibility must be provided under this section may be asserted directly against the person guaranteeing or providing evidence of financial responsibility. In such a case, the person against whom the claim is made shall be entitled to invoke all rights and defenses which would have been available to the owner or operator had such action been brought directly against the owner or operator.

(ed) This section shall not limit any other state or federal statutory, contractual or common-law liability of the guarantor for bad faith in negotiating or in failing to negotiate the settlement of any claim. This section does not diminish the liability of any person under § 107 or § 111 of the Comprehensive Environmental Response Compensation and Liability Act of 1980 [42 U.S.C. § 9607 or § 9611], or other applicable law.

Section 7. Amend §7417, Title 7 of the Delaware Code by making insertions as shown by underlining as follows:

~~The General Assembly finds and declares that in order to provide for rehabilitation of as many contaminated sites as possible, as soon as possible, voluntary rehabilitation of contaminated sites should be encouraged; provided that such rehabilitation is conducted in a manner and to a level of completion which will protect the public health, safety and welfare. To accomplish this purpose, any person conducting site rehabilitation under this chapter, either through his or her own personnel or by contract, shall be entitled to reimbursement from the Fund in accordance with regulations promulgated by the Department for the costs defined in § 7409 of this title provided such person notifies the Department of such contamination within 18 months after July 16, 1987, and begins all remediation work within 1 year after notification. Persons already engaged in site rehabilitation as of July 16, 1987, shall be entitled to reimbursements of all expenses incurred on or after July 16, 1987, provided the person is otherwise eligible for participation in accordance with this section, and reimbursement expenses are limited to those defined in § 7409 of this title. Participation in the reimbursement plan is subject to the following conditions:~~

~~(1) The first \$2,500 in costs as described in § 7409(b)(1) (7) of this title are not to be reimbursed by the Fund.~~

~~(2) The facility owner shall not be the federal government or any agency or subdivision thereof.~~

~~(3) Contamination results from normal aging and/or corrosion and is not the result of intentional damage, or im proper handling or installation.~~

~~(4) Contamination results from a release from an underground tank containing petroleum.~~

~~(5) Reimbursement for site rehabilitation either through a person's own personnel or through responsible response action contractors or subcontractors shall not be considered a state contract or subject to state bid requirements.~~

~~(6) Site rehabilitation shall be completed in accordance with criteria established by the Department.~~

~~(7) Nothing in this section shall be construed to authorized any payments for the repair or replacement of any tank or equipment.~~

~~(8) Procedural rules of this section shall have been met.~~

~~(9) The release did not result from any gross negligence, including, but not limited to, the following:~~

~~a. Wilful intent to conceal existence of a serious discharge;~~

~~b. Falsified inventory or reconciliation records;~~

~~c. Intentional damage to a petroleum storage system;~~

~~d. Willful failure to perform the inventory and reconciliation of records required pursuant to regulations prom-ulgated under this chapter;~~

~~e. Failure to meet retrofitting requirements contained in the regulations promulgated pursuant to this chapter;~~

~~f. Willful failure to make monthly monitoring system checks required pursuant to regulations promulgated under this chapter;~~

~~g. Violation of the Department's regulations.~~

Any person taking ownership of a facility or underground storage tank shall complete a Change in Ownership Assessment prior to the transfer of ownership of the facility or underground storage tank. Such person shall provide the written results of the Change in Ownership Assessment to the Department within thirty (30) days of such transfer.

Section 8. Amend§7419, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

~~The Department shall seek recovery of moneys expended from the fund for corrective action under this chapter where the owner or operator has violated substantive regulations pertaining to underground storage tanks which have been promulgated by the Department or has engaged in grossly negligent conduct.~~

The Department may use funding from the Hazardous Substance Cleanup Fund as described in 7 Delaware Code Chapter 91, Section 9113 to support the implementation of this Chapter.

Section 9. Amend §7907(5), Title 7 of the Delaware Code by making insertions as shown by underlining as follows:

a. Under a federal or state program governing environmental remediation of real property, including Chapter 91 of this title, Delaware Hazardous Substance Cleanup Act (HSCA), Chapter 74 of this title, the Delaware Underground Storage Tank Act, and Chapter 74A of this title, the Jeffrey Davis Aboveground Storage Tank Act;

SYNOPSIS

This Act makes a number of revisions, additions and technical clarification to Title 7 relating to Delaware's petroleum and hazardous substances underground storage tank program in order to ensure the protection of public health and the environment including drinking water.

The Act clarifies the Department's responsibility to assume control of a release situation and resulting cost recovery, and the liability of responsible parties for clean ups, and also expressly provides for contribution from other responsible parties. It is fair to require persons who have been involved in the commercial petroleum and hazardous substances storage industry, a highly-regulated activity, presenting an inherent risk to the environment and public health, to be liable for damages which result from that activity, and to show that the engagement in the activity did not produce any harm. This legislation shifts the burden to responsible parties to demonstrate whether their activities resulted in any harm because such persons should have better and more complete access to information, witnesses, and documents than the Department might have as the regulating agency. These remedial provisions relate back to the original date of enactment of Chapter 74. The cost recovery provisions replace the outdated provisions currently in 7 *Del. C.* § 7419 and elsewhere.

The Act amends the definition of "Facility" to eliminate any doubt as to its currently-enacted meaning. The Act adds a provision to require a Change in Ownership Assessment when facilities are purchased, for the purchaser's protection to insure due diligence, and establish the status of the facility for purposes of contribution analysis between responsible parties as may be needed.

The Act also clarifies the authority of the Department to access property in order to investigate and cleanup releases of petroleum and other hazardous substances resulting from leaking

underground storage tanks. Further, the Act amends the financial responsibility statutory language to be consistent with existing federal requirements.

Finally, in order to protect public health and the environment, the Act clarifies that, when site conditions warrant it, the Department may require that an environmental covenant be placed on a property as part of a risk based environmental cleanup of contamination resulting from a release from an underground or aboveground storage tank.